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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x
3 UNITED STATES OF AMERICA

4 v.

17 CR 708 (JPO)
Bail Hearing

5 RUSS GERSON

6 Defendant

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7
8 New York, N.Y.
August 30, 2019
9 11:30 a.m.

10 Before:

11 HON. J. PAUL OETKEN

District Judge

12
13 APPEARANCES

14 GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

15 DANIEL NESSIM

16 Assistant United States Attorney

17 FEDERAL DEFENDERS OF NEW YORK INC.

Attorneys for Defendant

18 CHRISTOPHER FLOOD

19 ARIEL WERNER

20 ALSO PRESENT: Lea Harmon, PTSO (SDNY)
Matthew Sowa, FBI

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(Case called)

DEPUTY CLERK: Starting with the government, Counsel, please state your name for the record.

MR. NESSIM: Good morning, your Honor.

Daniel Nessim for the government. Joining me at counsel table is Special Agent Matthew Sowa of the FBI and Pretrial Services Officer Lea Harmon.

THE COURT: Good morning.

MR. FLOOD: Good morning, your Honor. Christopher Flood, Federal Defenders on behalf of Mr. Gerson, standing up for Ms. Gatto. Also at counsel table with Mr. Gerson is Ms. Ariel Werner, our newest Federal Defender.

THE COURT: Good morning.

Good morning everyone. This is, I guess, a bail matter. I'm going to give you a chance to fill in any details, but the state of play, as I understand it, is that on Friday, August 23, Ms. Gatto of the Federal Defenders, filed on ECF a letter requesting permission for Mr. Gerson to travel to London on August 25.

I did not act on it. I was actually out of the country until Wednesday night of this week, but I've been in contact with my chambers about this. Then on Tuesday, the 27th, there was a follow-up letter from Ms. Gatto, defense counsel, requesting a bail modification for Mr. Gerson to travel on August 27, the date of the letter, and it said that

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1 the government took no position on the request.

2 There was a subsequent letter from the government
3 stating that it changed its mind, and it determined that it
4 would object, and then shortly thereafter, I think, or around
5 that time, pretrial services, as well as the government,
6 realized that Mr. Gerson had actually left for London on
7 August 25. And, therefore, the issue of an arrest warrant as
8 opposed to possibly scheduling a bail hearing was raised, and I
9 was considering it. And then the government went to Judge
10 Woods, who was the Part One judge, because I believe I was in
11 flight on Wednesday evening when this was playing out, and got
12 an arrest warrant for Mr. Gerson.

13 I will start with you, Mr. Nessim, if you'd like to
14 fill in any other information I need to know in terms of where
15 we stand now.

16 MR. NESSIM: I believe that's all -- that's the most
17 relevant information, your Honor. The defendant was arrested
18 yesterday afternoon when he arrived at JFK on his return flight
19 and was brought to the courthouse after that.

20 THE COURT: OK. So was he in custody of the marshals
21 last night or --

22 MR. NESSIM: He was lodged overnight at the MCC for
23 safekeeping and was picked up this morning by the agents and
24 brought to court.

25 THE COURT: I understand there was something with a

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1 drug issue, or not?

2 MR. NESSIM: So we haven't been able to get more
3 information on that. As far as we understand it, there was no
4 positive drug test.

5 THE COURT: I got a message through my deputy that
6 there was a positive drug test.

7 MR. NESSIM: So, we've tried to follow up on that, and
8 we haven't been able to figure that out. As far as we know,
9 there was no positive test.

10 THE COURT: OK. So what's your position as of now?

11 MR. NESSIM: We are seeking to have the defendant's
12 bail revoked. He has been sentenced. He had a surrender date
13 about six weeks out. Given that this is post -- you know, post
14 sentence, post conviction, the standard has now shifted, and
15 it's on the defendant to show by clear and convincing evidence
16 that he is not a flight risk.

17 He did return here. We are not pretending that didn't
18 happen. However, to travel internationally without court
19 approval that's been a requirement at the outset, and the ease
20 at which he did that, and the risk of that being repeated, is
21 something we take very seriously. Although at point our
22 position was we take no position on the travel, we did change
23 our position, and it's sort of beside the point. He needs
24 Court permission to travel internationally. He didn't receive
25 it. He traveled, nevertheless.

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1 THE COURT: Why did the government change its
2 position?

3 MR. NESSIM: Travel has been a big part of this case.
4 The defendant traveled internationally routinely. We thought
5 more carefully about it, and given the pending surrender date,
6 we felt that the flight risk was heightened.

7 THE COURT: So it wasn't as a result of learning that
8 he had actually left.

9 MR. NESSIM: We changed our position before we learned
10 that he had left. We put that letter in, and then shortly
11 thereafter learned from pretrial that he left the country.
12 Also, I note that pretrial filed a violation memorandum. And
13 in addition to the unauthorized travel, the defendant has not
14 been reporting to pretrial services as required for some time.
15 You know, it would not be something that would necessarily
16 require filing a violation memorandum in its on, but in
17 conjunction with this unauthorized travel, we take these
18 offenses very seriously, and we don't think the defendant can
19 satisfy the standard that he's not a flight risk.

20 THE COURT: First, I will ask Ms. Harmon if there's
21 anything you'd like to add.

22 MS. HARMON: No, your Honor. I don't have any
23 additional information.

24 THE COURT: Thank you.

25 Mr. Flood.

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1 MR. FLOOD: Thank you, your Honor. This is a
2 misunderstanding. As the government noted, the travel request
3 had been routine. I was going back through the docket, and I
4 lost count. It's somewhere close to 20 if not more, often
5 filed in the same kind of time frame. And the man is not a
6 flight risk. He returned, as stated, to the United States. He
7 was arrested coming off of the plane. He was granted a
8 surrender date by the Court for reasons that the Court knows.
9 He has been compliant with everything.

10 This is the first we've heard about not reporting, but
11 when I was going back through the docket, I saw that he was
12 supposed to report by internet. I'm not sure exactly what the
13 release conditions are because I'm standing in for Ms. Gatto,
14 but it is very difficult to understand how somebody can
15 demonstrate they're not a flight risk more than him just acting
16 as he had been routinely doing. He has business
17 internationally. He travels to the United Kingdom. He
18 traveled to places like Pakistan and the United Arab Emirates
19 that do not have extradition agreements with the United States.
20 I understand the government's suspicion, but that's all it is.
21 And, frankly, there is a problem with communication here that
22 falls on our office.

23 THE COURT: Well, that's what I -- I wish Ms. Gatto
24 were here, and I am tempted to ask why she is not.

25 MR. FLOOD: I can explain.

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1 THE COURT: OK.

2 MR. FLOOD: Because it goes to what happened here.

3 She got a verdict in a trial that she's been in, in front of
4 Judge Abrams, last night, an acquittal. But I have observed--

5 THE COURT: Is it relevant that it was an acquittal?

6 MR. FLOOD: That was informative. But I have observed
7 Ms. Gatto myself and the trial team all hours of the night
8 working on that trial, and it appears that Mr. Gerson's
9 communications with Ms. Gatto were not forwarded to the Court
10 in a timely way, as they normally would be. But after 19 other
11 times where it had been routine for him to expect that it had
12 been granted, it's not -- does not indicate anything like a
13 flight risk here. It's just someone acting in the normal
14 course. We understand that it's a different scenario post
15 sentencing, but the evidence is clear that he is not a flight
16 risk.

17 And the fact of the matter is the surrender date has
18 allowed him to continue his business to get his affairs in
19 order. He has paid his restitution bill because he has been
20 conducting his business. The reason that someone has a
21 surrender date are to get their affairs in order. He has a
22 wedding coming up end of October and he has yet to even meet
23 with the BOP because that's not unusual either for a surrender
24 date to understand what that date would be.

25 So when put all together -- and, by the way, the thing

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1 about the drug test is -- he wasn't even tested for drugs is
2 our understanding. That is just something that came out of
3 thin air. He's been compliant in every way. He was compliant
4 here to the best of his understanding.

5 THE COURT: Well, so what was the situation when he
6 left on Sunday? I just don't understand. If he sort of left
7 assuming that he had permission or if he left without bothering
8 to check with Ms. Gatto as to whether the order had been
9 signed.

10 MR. FLOOD: I think he assumed that he had permission,
11 and the details of the communication with Ms. Gatto, frankly, I
12 haven't been able to communicate with her about this because
13 she's --

14 THE COURT: What is she celebrating or something?

15 MR. FLOOD: Taking a well-earned day of rest after a
16 very intense trial. And when I say it falls on us, I don't
17 have the details about what communications came in and when,
18 but the fact of the matter is there were two motions filed in
19 the normal course. I don't know why there's one two days
20 later. I think he might have changed his travel plans again,
21 but I don't know.

22 But at the end of the day it is not unreas -- to the
23 extent there is a question of scienter, it is at best
24 negligence. But with past patterns of the government not
25 opposing and the Court's granting, that is all that took place

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1 here, and it is a misunderstanding. It does not indicate a
2 flight risk or any kind of conduct or thinking that would meet
3 the standards for having him being detained.

4 It is a two-month sentence. And the point of having a
5 surrender date to get stuff in order for that two-month
6 sentence, to have him begin it now is actually worse than if he
7 had been put in on the day of sentencing because one would be
8 prepared to go in that day. Instead -- and I can convey to the
9 Court, Mr. Gerson was shocked when he got arrested because he
10 didn't understand what had happened had actually happened.

11 THE COURT: But wasn't Ms. Gatto getting ahold of him
12 on the 28th and 29th when he realized --

13 MR. FLOOD: Sorry. Say again?

14 THE COURT: Wasn't Ms. Gatto texting him and emailing
15 him on, whatever, the 26th, 27th when she realized that I
16 hadn't signed the order approving?

17 MR. FLOOD: I don't know. And it wouldn't surprise me
18 if she hadn't only because I know what prep for trial looks
19 like, and it's absorptive. One gets totally focused on what's
20 in front of them.

21 THE COURT: So does he have other international travel
22 plans in the next -- is he still working for the same employer
23 who wrote a letter --

24 MR. FLOOD: Yes.

25 THE COURT: -- for sentencing?

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1 MR. FLOOD: Yes.

2 THE COURT: Does he have other international travel
3 between now and the October surrender date?

4 MR. FLOOD: The wedding of his stepdaughter is in the
5 south of France, but beyond that, I'm not aware of any further
6 international travel. And the notion that he would flee to
7 avoid a two-month sentence that he has worked very hard to
8 prepare to get his affairs in order to serve and risk life as a
9 fugitive for the rest of his life with a bail jumping charge
10 unable to go to any extradition country and identify himself
11 personally in order to avoid eight weeks in prison is just not
12 reasonable. That's just not what happened.

13 THE COURT: Is there anything you'd like to add? The
14 truth is, I understand why you went to the Part 1 judge. I was
15 probably not going to sign an arrest warrant. My sense was
16 that he was not -- when the government suggested that he was
17 going to flee, I never really bought that. I think that
18 there's a concern about taking this case seriously, which I
19 addressed at sentencing and other times, and I think this might
20 be part of that, but I do think there is a communication issue
21 here. I don't know exactly who's at fault, but I don't think
22 it's ever been an issue of risk of flight. But you can take a
23 stab at persuading me otherwise if you want.

24 MR. NESSIM: We understand, your Honor. Just as a
25 preliminary matter, we went to Part 1 judge because of timing

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1 because we wanted to have --

2 THE COURT: I understand. I'm not criticizing you for
3 it.

4 MR. NESSIM: But Mr. Flood raises an interesting point
5 about the second application. Clearly, Ms. Gatto, trial or
6 not, was aware the first order had not been granted and took
7 the efforts to file a subsequent letter, which suggests that
8 Mr. Gerson not only didn't care to check if the order was
9 filed, but didn't let his attorney know he was actually outside
10 of the country, which I think is sort of a disregard and
11 recklessness which somewhat heightens flight concern here.

12 And in terms of the sentence, I mean, obviously, we
13 hope that no one flees, and sometimes people flee when it's not
14 necessarily something that others would view as reasonable. I
15 think that Mr. Gerson could probably live a nice life in any
16 number of places outside of the United States to avoid serving
17 an eight-week sentence, as short as that might be, you know,
18 for some other defendants. So we do take the flight risk
19 seriously.

20 We think what happened here is certainly a violation
21 of his pretrial release and would warrant, you know,
22 considering that he is a flight risk or at least can't prove he
23 is not. He has a passport in his possession. He clearly flew
24 out of the country without being stopped.

25 THE COURT: Why aren't you asking are for the lesser--

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1 the question is whether there is a combination of conditions
2 that would ensure his appearance. Why aren't you asking for a
3 lesser sanction of no further travel requests other than
4 perhaps the wedding, which is the reason I set the surrender
5 date when I did, and surrender his passport.

6 MR. NESSIM: We certainly would be asking for that
7 short of revocation. But it's not is there no set of
8 conditions. It's whether he has shown by clear and convincing
9 evidence that he is not likely to flee. Given the fact that he
10 has left the country without court approval and was
11 successfully able to do that, whether or not he returned, we
12 don't think that that satisfies the clear-and-convincing
13 evidence standard.

14 THE COURT: OK. Mr. Flood, why shouldn't I order the
15 passport surrendered?

16 MR. FLOOD: Well, your Honor, because there's
17 actually-- it's just a mistake. It doesn't show a change in
18 conduct. He's been reliably under these conditions and there
19 is an understandable communication breakdown here. And in our
20 view he hasn't actually done anything to warrant a sanction.
21 Certainly the Court can admonish him. And this is not the kind
22 of thing that is going to be repeated having had this
23 experience, but if the Court orders that, we understand.

24 THE COURT: You said he doesn't have any international
25 travel planned at this point?

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1 MR. FLOOD: Other than the wedding. And just now I --
2 from him, of course, he has business ongoing, and there might
3 be a need to travel again before his surrender, so -- I don't
4 know this man's business. I just met him. But I look at this
5 record, and I think, you know, it's an understandable mistake.
6 It would be one thing if there was an intention to violate a
7 court order.

8 And just to address Mr. Nessim's point about there
9 being more than one motion. That reflects Ms. Gatto's efforts.
10 I don't have any information about what communication went on
11 between them, but it is hardly sinister. And if he was to do
12 that, why return, right? Which he did. So I think all of the
13 evidence points to that he just made a mistake. Mistakes do
14 happen, and that doesn't warrant a change of bail condition.

15 THE COURT: Ms. Harmon, anything you'd like to chip
16 in?

17 MS. HARMON: Naturally, I think I would disagree with
18 defense counsel, and if you were to continue the defendant on
19 bail, I would suggest that he did surrender his passport.

20 THE COURT: So if he surrendered his passport, but I
21 specifically allowed the travel for purposes of the wedding,
22 the family wedding, that wouldn't be something that would be
23 difficult to accommodate?

24 MS. HARMON: No. As mr. Gerson knows, because we did
25 it several times, once you sign the order allowing him to

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1 travel, then we arrange for him to pick the passport up from
2 our office, and then he returns the passport upon return.

3 MR. FLOOD: We don't object to that.

4 THE COURT: OK. All right.

5 Given all the circumstances, which include the fact
6 that there have been many bail modification orders allowing
7 international travel, some of them have been very last minute,
8 like this, and it's unfortunate. And maybe I have been too
9 lenient. There are a lot of judges who wouldn't have allowed
10 any of them, and maybe I've learned from this that I shouldn't
11 be so lenient about these things.

12 In any event, that is part of the context here. I'm
13 not persuaded that this shows a risk of flight. I do find by
14 clear and convincing evidence that the defendant is not a risk
15 of flight. However, I am concerned about the general following
16 of the rules; and based on those considerations, I am going to
17 require -- the one change I'm going to make to the bail is
18 require the surrender of the passport. And I will allow the
19 travel for the purpose of the family wedding. Please make sure
20 that you give notice of the dates at least two days in advance
21 so that -- well, hopefully even more than that, so I can make
22 sure that the order is signed and give enough time for
23 Ms. Harmon to return the passport.

24 I just want to emphasize that I don't really know how
25 much of this was Mr. Gerson or Ms. Gatto being busy with trial

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1 or whatever, but, you know, it's a federal case, there's a
2 sentence coming up, there's a conviction here, and the rules
3 have to be taken seriously and followed, and that's why I'm
4 making this change.

5 Anything else?

6 MR. NESSIM: No. Thank you, your Honor.

7 MR. FLOOD: Thank you.

8 THE COURT: Thank you very much. We're adjourned.

9 (Adjourned)

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